

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DAN WILSON)	
Claimant)	
VS.)	
)	
BOARD OF PUBLIC UTILITIES)	Docket No. 190,233
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appeals from a November 25, 1997 post-award Preliminary Decision by Administrative Law Judge Robert H. Foerschler denying claimant's application for future medical benefits and attorney fees.

ISSUES

This is a post-award proceeding for medical treatment and attorney fees. Claimant's request for additional medical treatment was denied by the Administrative Law Judge. The order states the question of attorney fees "will be kept under advisement." Claimant seeks Appeals Board review of the following issues:

- (1) Whether claimant is entitled to additional medical treatment.
- (2) Whether counsel for claimant is entitled to an award of a reasonable attorney fee.

Respondent and the Fund raise an issue as to whether the Appeals Board has jurisdiction to review the Preliminary Decision at this stage of the proceeding.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments presented, the Appeals Board finds and concludes as follows:

An administrative law judge may conduct a preliminary hearing upon a post-award application for medical or as a part of a post-award review and modification proceeding. This case came before the Administrative Law Judge on claimant's September 12, 1997 filing of a

Form E-3 Application for Preliminary Hearing. On September 24, 1997, claimant served a Notice of Preliminary Hearing set for November 13, 1997 on claimant's request for future medical treatment. On November 20, 1997, claimant filed for review and modification of the June 16, 1995, agreed award. The order before the Board was not issued pursuant to claimant's Application for Review and Modification, but instead was pursuant to the Application for Preliminary Hearing.

The Appeals Board has on several occasions approved the use of preliminary hearing procedures as a part of a post-award application for medical and for review and modification. The Board has done so, however, based largely upon the fact that the parties treated the proceedings as a preliminary hearing. See Bahr v. Link, Inc., Docket No. 199,140 (March 1996); Gillis v. Havens Steel Company, Docket No. 112,383 (September 1995); Meeks v. Farha Quarterhorses, Docket No. 135,085 (August 1995).

There is no specific statutory authority for a post-award preliminary hearing. The preliminary hearing statute, K.S.A. 1997 Supp. 44-534a, provides:

"Upon a preliminary finding that the injury . . . is compensable. . . , the administrative law judge may make a preliminary award of medical compensation . . . to be in effect pending the conclusion of a full hearing on the claim" (Emphasis added.)

For several reasons, however, the Appeals Board has concluded that the preliminary hearing procedure may be used in post-award proceedings. First, the above-quoted language from K.S.A. 1997 Supp. 44-534a was not, in our opinion, intended to limit the use of preliminary hearings. Instead, it was intended to indicate the final award would supersede any preliminary hearing order. Application for review and modification reopens the hearing. Second, policy justifications for preliminary hearings before an award continue to exist after an award. The need for a prompt resolution of issues relating to medical care and temporary total disability benefits may be as urgent after an award as before. Finally, the Act contains at least one example where the legislature expressed the authorized use of a preliminary hearing procedure after an award. K.S.A. 1997 Supp. 44-556 authorizes the use of preliminary hearing procedures under K.S.A. 44-534a to enforce rights to medical treatment while a case is pending on appeal before the Court of Appeals. Also, K.S.A. 1997 Supp. 44-551 authorizes use of a preliminary hearing to enforce payment of medical benefits while a case is pending before the Appeals Board.

By affirming the use of a preliminary hearing procedure after an award, the Appeals Board understands it is ratifying a practice which has existed and been followed by practicing attorneys, generally, as evidenced by the above-cited cases. The practice is one which, in our opinion, is consistent with the statutory scheme and applicable policy considerations. The Administrative Law Judge did not, therefore, exceed his jurisdiction in this case by conducting a preliminary hearing as a part of a post-award review and modification proceeding.

Because this claim is being treated as an application for preliminary hearing, the Appeals Board does not have jurisdiction to consider claimant's argument that the evidence supports a finding that claimant is in need of medical treatment.

K.S.A. 1997 Supp. 44-551 limits the jurisdiction of the Appeals Board. The Appeals Board has jurisdiction to review decisions from a preliminary hearing in those cases where one of the parties has alleged the administrative law judge exceeded his or her jurisdiction. This includes specific jurisdictional issues identified in K.S.A. 1997 Supp. 44-534a. A contention that the Administrative Law Judge has erred in his finding that the evidence shows a need for medical treatment is not an argument the Appeals Board has jurisdiction to consider.

An order for payment of attorney's fees pursuant to K.S.A. 44-536(g) is considered a final award. See Shirley v. Vulcan Materials Company, Docket No. 165,635 (Sept. 1995). Therefore, the Appeals Board would have jurisdiction to review the portion of a post-award preliminary hearing order relating to attorney's fees. But, contrary to the assertions of claimant's counsel, the Administrative Law Judge did not deny his request for post-award attorney fees. Rather, the Preliminary Decision order reads: "As to the attorney's fees requested . . . [t]his whole matter will be kept under advisement pending a setting and hearing on the claimant's new request [for review and modification]." It is anticipated that claimant's application for review and modification will result in a final decision on both issues raised in this appeal. Should any party feel aggrieved by that decision, then that would be the appropriate time to seek Appeals Board review.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the claimant's appeal from the Preliminary Decision of November 25, 1997 entered by Administrative Law Judge Robert H. Foerschler should be, and the same is hereby, dismissed.

IT IS SO ORDERED.

Dated this ____ day of April 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Keith L. Mark, Mission, KS
Robert P. Burns, Kansas City, KS
Dennis L. Horner, Kansas City, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director